



EMPLOYER'S LIABILITY REGARDING DOMESTIC WORKERS AND THEIR OCCUPATIONAL HEALTH AND SAFETY IN TURKEY

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ABSTRACT

Purpose- The aim of this study is to examine the employer's liability concerning domestic workers and their occupational health and safety in the Turkish legal system.

Methodology- The employer's liability concerning domestic workers and their occupational health and safety will be discussed in light of the Turkish legislation and views of scholars.

Findings- It is stipulated under Turkish Code of Obligations that the employer is obliged to take any type of measures and to keep tools and vehicles available as required to ensure occupational health and safety in the workplace.

Conclusion- Domestic workers are real workers and bearing this in mind the domestic workers have distinctive structures. New laws are necessary to guarantee decent occupational health and safety conditions. However, the law is not always sufficient to improve occupational health and safety conditions for a domestic worker. The topic of domestic workers is not only a legalisation or an absense of perception issue but also a community education challenge.

Keywords: Domestic worker, household employee, occupational health and safety, labour law, Turkish Code of Obligations No. 6098, The Code of Occupational Health and Safety, Health and Safety Law No. 6331.

JEL Codes: K31, K32, J81

1. INTRODUCTION

The increase of educational level and social changes enabled more women to join the labour markets. Women have begun to participate in working life markedly. However, participation in the labour market and having a job, did not exclude the traditional division of domestic tasks in most countries (ILO, 2010: 6). The house responsibilities which have been traditionally assigned as women's work still remains. Therefore, it has needed to be transferred to another woman. Household employees who are named domestic workers filled the gaps and inefficiencies between the working womens' work and their house responsibilities (ILO, 2012: 1; Saribay Öztürk, 2016: 172).

Because of the name similarities, homeworkers and household employees can be perceived to serve the same purpose. It should be noted that household employees, or so named domestic workers, and homeworkers are strictly different. A homemaker who for a fixed rate of remuneration, carries out their work in his or her home for an employer who is not the final consumer of the product or service provided (Huws and Podro, 1995: 2). On the other hand, domestic workers typically work in private homes performing various household tasks such as cleaning the house, cooking, washing and ironing clothes, taking care of children, or the elderly and sick members of a family, gardening, guarding the house, and driving for the family (Albin and Mantouvalou, 2011: 2; ILO, 2012: 1). Ultimately, a household employee/ a domestic worker performs her/his work inside the employer's home.

According to the International Labour Organization (ILO), at present there are at least 67.1 millions adult domestic workers all around the world. Additionally, this number is likely to be much larger due to the high informality and irregularity in the sector, as well as the lack of reliable statistics. On the other hand, among the 67.1 million estimated domestic workers

globally, the domestic work sector is largely comprised of female workers, approximately 80 percent are women ((ILO, 2016: IX).

With reference to the data from the Social Security Institution, as of July 2017, the number of insured employees who paid their premiums by the employers and working in domestic services was 42.562, and the number of insured employees working less than ten days per month was announced as 6.124.

Moreover, according to the Turkish Statistical Institution data of April 17, 2017, the rate of informal workers constitutes 32.5% of total employment.

Domestic work has been characterized as being precarious employment; due to the social and psychological tenuousness, the economic reasons, being undervalued, poorly regulated, as well as the workplace being inside private homes, often becoming invisible (Johnstone, 2013: 17). In addition to this, there high risks of ill-health.

There is a complexity to the employment relationship for domestic workers, exclusion from social protection, the lack of a stable job description and the special character of the working space, make occupational health and safety measures more important for domestic workers (Ulutaş and Öztepe, 2013: 44).

This study aims to shed some light on the current situation and the problems domestic workers face in the field of occupational health and safety and to develop solutions for these problems.

2. REGULATION OF DOMESTIC WORKERS FIELD OF OCCUPATIONAL HEALTH AND SAFETY IN ILO AND IN TURKEY

At the present moment, ILO Convention No. 189 and Recommendation No. 201 have the most important instruments on domestic work. In the 100th Session of the International Labour Conference, in June 2011, the International Labour Organization adopted Convention No. 189 and supplementing Recommendation No. 201 regulating the terms and conditions of work for domestic workers (Albin and Mantouvalou, 2011/1: 9; Blackett, 1998: 6; Erdoğan and Toksöz, 2013: V)

ILO Convention No. 189 strives to guarantee that domestic workers have equal health and safety conditions and labour rights same as the other types of workers. Article 13(1) states the following: "Every domestic worker has the right to a safe and healthy working environment. Each Member shall take, in accordance with national laws, regulations and practice, effective measures, with due regard for the specific characteristics of domestic work, to ensure the occupational safety and health of domestic workers." Unfortunately, ILO Convention No. 189 has not yet been ratified by Turkey.

Currently, domestic workers are excluded from the scope of Labour Law No. 4857 by the virtue of Article (4): "The provisions of this Act shall not apply to the activities and employment relationships mentioned below". Consequently, domestic services are one of the employment relationships mentioned in Article 4 (Article 4/(e)). Therefore, domestic workers are exempted from coverage under Labour Law No. 4857 regarding labour relations and are only protected by the Turkish Code of Obligations No. 6098 (TCO.). The provisions of Turkish Code of Obligations No. 6098 on service contracts and its general provisions are applicable to domestic workers (Caniklioğlu, 2012: 34; Ocak, 2012: 116; Özdemir, 2014: 114; Baycık, 2013/3: 110; Sarıbay Öztürk, 2017: 31).

Almost all over the world, occupational health and safety regulations, which aim to prevent injury or illness in the workplace, protect formal workers in formal work environments such as mines, factories, offices and shops. These regulations do not protect workers who work in private homes, which means that even though domestic work is such vital source of employment, and even though there are many health and safety risks involved in this work, and even though domestic workers are vulnerable to poverty if they become sick or injured, aforesaid legislation in many countries does not cover them (Alfers, 2011: 3).

Despite the fact that The Code of Occupational Health and Safety includes as many people as possible within its scope in principle, domestic workers are excluded from the scope of The Code of Occupational Health and Safety. This exclusion is criticized by the doctrine and evaluations are different from each other (Centel, 2013: 82-83; Ertürk, 2012: 14; Caniklioğlu, 2012: 34; Ocak, 2012: 116; Özdemir, 2014: 113-114; Baycık, 2013/3: 110; Sarıbay Öztürk, 2015: 8-10). On the other hand, the Turkish Code of Obligations No. 6098 on health and safety provisions are applicable to domestic workers. Consequently, the domestic workers are not completely unprotected by health and safety legislation. Even though Turkish Code of Obligation stipulates a general article regarding the occupational health and safety of the worker, The Code of Occupational Health and Safety arranges the things which the employer should do to perform mentioned obligation at full length. As a matter of fact, The Code of Occupational Health and Safety has a wider assertion than Turkish Code of Obligations No. 6098.

3. HEALTH AND SAFETY RISKS FOR DOMESTIC WORKERS

Homes present a number of health and safety risks for the people who work in them (Alfers, 2011: 3). A study prepared in Salvador, Brazil, found women domestic workers experienced higher rates of injury than women workers in other occupations (Santana et al., 2003: 70).

Health and safety risks for domestic workers can be classified at four headlines. First one is physical risks, second one is chemical risks, third one is biological risks and the last one is psychosocial risks (Ulutaş and Öztepe, 2013: 50).

Physical risks are derived from carrying heavy weights, being forced to climb up to high places, cutting or burning in the kitchen.

Domestic workers contact with toxic or unhealthy substances as another important health and safety risk; labeled as, chemical risks. Very seldom an employer will supply protective equipment such as gloves or masks (Alfers, 2011: 11). Therefore, domestic workers are frequently faced with skin and respiratory tract diseases.

The lack of protective equipment also causes biological risks, when domestic workers are caring for sick members of the household. Particularly if the ill employer has infectious diseases such as HIV/AIDS and/or tuberculosis, the domestic workers are confronted with these biological risks to themselves (Alfers, 2011: 12; Ulutaş and Öztepe, 2013: 50).

The verbal abuse and humiliation they suffer at their places of work is another serious health and safety problem. A lot of employers behave as if the domestic worker is their slave, treating them as if it is demeaning work. The domestic worker is often disrespected (Alfers, 2011: 8). Moreover, the working hours are unpredictable, exhausting and monotone. In consideration of the foregoing, domestic workers feel like the work they do is nonsense.

4. PROVISIONS OF TURKISH CODE OF OBLIGATIONS NO. 6098 PERTAINING TO THE OCCUPATIONAL HEALTH AND SAFETY OF DOMESTIC WORKERS IN TURKEY

Turkish Code of Obligations No. 6098 did regulate occupational health and safety provisions of domestic workers. The mentioned provisions are stipulated between Articles 417 and 419.

It is regulated under Article 417 of the Turkish Code of Obligations that the employer is obliged to protect and respect worker's personality and keep a reliable and fair order within the workplace, to take required measures for workers not to come to psychological and sexual abuse and those who have suffered such abuses not to suffer any further damage (TCO. A. 417/I).

The same article also stipulates that the employer is obliged to take any type of measures and to keep tools and vehicles available as required to ensure occupational health and safety in the workplace; workers as well are obliged to observe any kind of measures that have been taken regarding occupational health and safety. (TCO. A. 417/II).

The case-law of the Supreme Court and the teaching state that, any kind of measures should be determined according to science, technic and experience's situation and level reached at that time (Caniklioğlu, 2012: 34; Ekonomi, 1987: 154-155; Güzel, 2003: 19; Özdemir, 2014: 66-69; Soyer, 2003: 33; Süzek, 1985: 179-180; Y10HD, 27.5.2008, 2626/7283; Y10HD, 4.3.2008, 6310/282 www.hukukturk.com.tr, 01.12.2018)

The employer can not shuffle off this liability on the grounds of his/her economical inadequacy, lack of experience, the ignorance of scientific and technological developments or practices in the case of not taking these measures in similar works (Süzek, 1985: 245-245).

Since The Code of Occupational Health and Safety clearly excludes domestic services, taking any kind of measures does not translate into to enacting The Code of Occupational Health and Safety Article (2/2, c). However, Article (2/2, c) which regulates general responsibilities of employers can be used as a guiding principle.

In addition to this, the responsibilities which are distinctly regulated in The Code of Occupational Health and Safety, such as designating workers as an occupational safety specialist, occupational physician and other health staff, preparing emergency plans or receiving medical reports, shall not be an obligation for the domestic worker's employer. However, the domestic worker's employer shall identify the risks which are linked to the working environment and which the workers are exposed. As it is mentioned before, the employer shall determine any kind of measures pursuant to science, technic and experience's situation and level reached at that time.

Another key point to be emphasized is the exact meaning of "keeping tools and vehicles in full available required to ensure occupational health and safety in the workplace". There is no doubt that employer should supply the kit which is required for the work. Despite the fact that, the bottom line is completely dissimilar. To illustrate, before cleaning the house is it sufficient to supply the cleaning materials or should the employer (landlord/landlady) inspect the materials in terms of which are harmful to health or not. Additionally, should the employer forbid the worker from wiping the windows if the

window is high and there is no precaution for falling. Afterwards, the dispute will be whether the employer will be found to be fault with the case or not.

Despite the general usage and customs disallowing the domestic workers to be categorized as a real employee and the landlady/landlord as a real employer, the truth is that they are both parties of an employment contract. The Law which is applicable to them is the Turkish Code of Obligations No. 6098, as it indicates that the employer is obliged to take any kind of measures and to keep tools and vehicles in full available required to ensure occupational health and safety in the workplace. Supportively according to court decisions and the expert reports, keeping tools and vehicles in full available has been interpreted that it is not just the keeping tools or vehicles in full but also to procure them in a healthy way. Furthermore, if it is impossible to ensure occupational health and safety in the worksite, the employer shall forbid the hazardous duties.

In respect to this, there have been many court decisions, especially domestic worker's who have fallen from high. In the years 2013 and 2014, two domestic workers (Rukiye Şimşek and Fatma Aldal) died because of falling from high while wiping the window. According to the accident report and court decisions, the defendant landlady was found to be primary at fault and decedent domestic worker was at secondary fault (for further information, www.bianet.org). Contrary to popular belief, breaching the domestic worker's occupational health and safety liabilities can cause serious consequences to the employers.

In point of fact working in a private home causes difficulties regarding occupational safety and health requirements, as many employees – and almost all governments regard the home as “safe” and perceive the labour inspection in private homes as a breach of privacy. Therefore valuing the employer's right to privacy above the domestic worker's right to safety and health at work (ILO, 2010: 61–62; Johnstone, 2013: 17). Nevertheless, the workplace which is the home for the landlady should be made controllable and inspectable. At that point in order to not to breach security of the domicile, the obligatory declaration from the employer about the preventive measures could be acceptable.

Consequently, the law is not always sufficient to improve conditions for a domestic worker. Since, if the employee did not aware of their rights and if domestic worker did not demand it, having a claim is worthless. Many domestic workers are simply not aware of their rights with regard to health and safety. Not only the government but also organizations of domestic workers need to make a concerted effort to educate domestic workers about their rights and to ensure aforesaid rights are upheld (Alfers, 2011: 16).

5. THE OCCUPATIONAL HEALTH AND SAFETY RESPONSIBILITIES OF EMPLOYER'S FROM TURKISH CODE OF OBLIGATIONS AND TURKISH PENAL CODE

Responsibilities arising from an employer's breach of their duty to protect the employee can be divided into two parts. One of them is the compensation responsibility which arises from private law via Turkish Code of Obligations. The other one is the criminal responsibility via Turkish Penal Code (TPC.) (Özdemir, 2014: 535-630).

As it was mentioned above, it is stipulated under Article 417/II that the employer is obliged to take any kind of measures and to keep tools and vehicles available required to ensure occupational health and safety in the worksite; workers as well are obliged to observe any kind of measures taken regarding occupational health and safety.

In witness whereof, indemnifying the death of worker, injuring physical integrity, or any damages depending on the violation of personal rights due to any act of the employer contrary to the law and contract including the above provisions, are subject to provisions of liability resulted because of being contrary to the contract (Article 417/III). Aforesaid liability give a rise to pecuniary compensations. That means the employer would be liable to pay compensation to the employee or the relatives of the deceased. Various compensation articles are regulated and named as material compensation, immaterial compensation or compensation for loss of support.

After all, according to the Turkish Code of Obligations, the employers have a statutory obligation when domestic worker could not benefit the social security institution's contributions. Titled as “when working in household organization” regulates in Article 418 that if the worker works in a household organization together with the employer, then the employer is obliged to provide adequate food and a proper shelter. If the worker fails to fulfill performance of work without his default due to illness or accident the employer is obliged to meet the care and treatment of the worker for two weeks if employed for up to one year and not entitled to benefit from social insurance supports. For every service year of the worker the said period is increased by two days for each service year provided this term is not to exceed four weeks. The employer is obliged to fulfill the same obligations in the case of worker's pregnancy or giving birth (TCO. A. 418).

As it was mentioned above, the responsibilities arising from the employer's breach of their duty to protect the employee can be a criminal responsibility as well. The criminal responsibility via Turkish Penal Code can be reckless killing (TPC. A. 85) or reckless injury (TPC. A. 89).

It is stipulated under Article 89/1 of the Turkish Penal Code that a person who recklessly causes another physical pain or who impairs another's health, or ability to perceive, shall be sentenced to a penalty of imprisonment for a term of three months to one year, or a judicial fine. Moreover, this fine is gradually increased based on the assessment of damage and the number of wounded man (TPC. A. 89/2, 3, 4).

Turkish Penal Code is also stipulated under Article 85 that any person who causes the death of another by reckless conduct shall be sentenced to a penalty of imprisonment for a term of two to six years. If the act results in the death of more than one person, or the injury of more than one person together with death of one or more persons, the offender shall be sentenced to a penalty of imprisonment for a term of two to fifteen years.

6. CONCLUSION

Domestic workers are excluded from the scope of Labour Law No. 4857 and The Code of Occupational Health and Safety. They are in the scope of the Turkish Code of Obligations No. 6098, regarding both labour relations and health and safety provisions. Especially, domestic workers are separated from real workers by the national laws. It should be admitted that domestic workers have sui generis features and this special character should be taken into consideration while regulating the provisions relating to domestic workers. Nevertheless, contrary to popular belief, domestic workers are real workers and they deserve to be treated as real workers the same as other workers.

For the first time, the International Labour Organization via ILO Convention No. 189 and Recommendation No. 201 regulated the terms and the conditions of decent work for domestic workers. Correspondingly, some countries have regulated their national law in parallel with aforesaid provisions. The expectation is the ratification of ILO Convention No. 189 by Turkey and the realisation of the necessary amendments in the domestic legislation (Sarıbay Öztürk, 2016: 176-178; Sarıbay Öztürk, 2017: 47).

In summary, either new provisions in Law No. 6331 or a entirely new law, is needed to ensure decent labour conditions. One specific to domestic labour and the unique conditions the domestic worker's conditions. Both of them can be defended and criticized equally. As it was mentioned before, the bottom line is the need for regulating provisions regarding the domestic workers; they are real workers and bearing this in mind the domestic workers have distinctive structures.

It is a fact that the inclusion of domestic workers within the scope of the The Code of Occupational Health and Safety would have positive physical effects. However, domestic workers and their workplaces have sui generis specialities. Therefore, even domestic workers are included in the scope of Law No. 6331, the provisions should be specialised for domestic workers. The second option which appears to us more persuasive, is conducting a more comprehensive Law for just domestic workers (Sarıbay Öztürk, 2017: 47). Especially in order to prevent occupational accidents and professional diseases concerning the domestic work sector, the risk factors should be analysed, culminating in preventive measures that should be made obligatory. Put in a nutshell, in the recent years, Labour Courts have signed many decisions which will raise awareness in the issue of occupational health and safety of domestic workers. Nevertheless, there still isn't any legal arrangement other than the Turkish Code of Obligations.

According to the Turkish Code of Obligations No. 6098, responsibilities arising from an employer's breach of the duty to protect employee can be compensation responsibility such as material compensation, immaterial compensation or compensation for loss of support or criminal responsibility such as reckless killing or reckless injury. In order to prevent employer's breach of duty to protect an employee, the workplace should be controllable and inspectable. It is surely beyond doubt that in the conflict between an employers' privacy and the domestic workers' decent working conditions, the former often overrides (Mantouvalou, 2012: 6). As it was stated above in order to not breach the security of the domicile, the compulsory declaration from the employer outlining and guarantying the preventive measures can be acceptable.

Domestic work has been traditionally assigned to women in the vast majority of societies and considered worthless by the same society. Domestic work's low status contributes to employers treating domestic workers poorly. In contrast, domestic work is important work and this message needs to be present explicitly to the public as a whole and to employers of domestic workers in particular (Alfers, 2011: 16).

The problem for domestic workers is not only the deprivation from legal regulation but also the existence of a gap between the formal legal entitlements of the domestic workers and their treatment in practice (Sarıbay Öztürk, 2016: 171). Much more research needs to be conducted, specifically in occupational health and safety. For instance, a study which shows the impact on domestic worker's bodies of activities like lifting, pulling, pushing, sweeping, bending over, and standing for long periods, as domestic workers commonly do. This kind of research may help convince policymakers and employers that protecting the health of domestic workers at work is significant. (Alfers, 2011: 16).

Much work still has to be done in this regard. Bearing in mind that the topic of domestic workers is not only a legalisation or an absence of perception issue but also a community education challenge. Many domestic workers do not know their

rights, so they are unable to demand protections from their employers. The underlying reason for the problem is, so many domestic workers have come from poor backgrounds, often have little education, and are isolated from other workers. Furthermore, in order to change the circumstances of the domestic workers, it should be started from somewhere. Bringing domestic workers into the light, not leaving them in the shadows of the labour market could be the starting point. Not only the government but also the organizations of domestic workers have to make a concerted effort to educate the domestic workers about their rights and to ensure these rights are upheld.

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